PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

OFFICE OF THE GENERAL COUNSEL
Post Office Box 1477 • Temecula, CA 92593
Telephone (951) 770-6000 Fax (951) 695-7445

General Counsel
Steve Bodmer

Deputy General Counsel
Michele Hannah

Associate General Counsel
Breann Nu'uhiwa
Lindsey Fletcher

Of Counsel
Frank Lawrence

March 15, 2018

Ex Parte Filing

Secretary Marlene Dortch
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

RE: The Pechanga Band's Opposition to Second Draft Report and Order (WT 17-79)

Dear Chairman Pai and Members of the Commission:

The Pechanga Band of Luiseño Indians (Pechanga Band) opposes the second draft Report and Order released on March 1, 2018, that purports to narrow the obligations of the Federal Communications Commission (FCC) under the National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA) and restricts tribal rights secured by those laws. The draft order's approach will be detrimental to tribal governments, tribal cultural and historic resources, and do very little to encourage deployment of wireless service to areas, like ours, that need it most.

Fifteen years ago, the FCC stated that it was impractical for it to consult on thousands of existing, new and proposed cell sites, despite its obligation to do so. In response, Indian Country endorsed the Tower Construction Notification System as an elegant solution that facilitated the telecommunications industry working directly with tribal nations to address issues of concern so that it would be unnecessary in nearly all cases for the FCC to engage in consultation. The alternative, which will be the outcome if the current order is approved, is that tribal nations will demand direct consultations with the FCC on potentially hundreds of larger tower sites, a far slower process than the tribal-industry process.

The Commission has a trust responsibility to tribal nations, not to the wireless industry. The draft Report and Order does not reflect this trust responsibility and diminishes the Pechanga Band's ability to protect our cultural and historic properties. In particular, there are three major areas in which the draft Report and Order is most egregious.

I. Removes Tribes from Historic Preservation Assessments

The draft Report and Order, without any consideration for the sweeping impact it will have on tribal governments, completely cuts tribes from historic properties assessments making an explicit finding that applicants need not use tribes as "consultants," but rather, that applicants can use any

consultant, regardless of their experience and knowledge about *tribal* cultural resources. The Report and Order encourages industry to exclusively rely on its own consultants whose understanding of Native culture is limited, if any, rather than access the unique expertise of tribal nations with regard to impacts on their own cultural areas. These consultants will be unable to assess these resources properly as they cannot relate the cultural values that all tribal cultural resources hold for their communities. A consultant will not be able to assess a landscape or a traditional cultural property because the values inherent in those resources lie with the affiliated tribal community. We are disheartened by the FCC's clear failure to consider these inherent tribal values and its paternalistic approach that consultants know Native culture better than our tribal nations.

In another dismissal of tribal interests, the Report and Order eliminates tribal fees for initial historic preservation assessments (which often number in the hundreds per month). As our June 15, 2017, comments note (attached hereto and incorporated herein), while a handful of tribal nations have charged exorbitant fees for review that does not include all 573 nations. The FCC is seeking to penalize all tribes, rather than consider a fair fee schedule for tribes who provide professional services, which includes the gathering and transmission of internal and other tribal data concerning the presence of historic properties, their inherent tribal values, and impacts thereto by a given project. The Report and Order is patently unfair to tribes in this respect. We believe that the FCC, likely because of its dismal consultation efforts, grossly underestimates the time tribes put into these reviews and the effort tribes expend to provide quality data to applicants to ensure that impacts to cultural resources are avoided or minimized.

II. Removes Small Wireless Facilities from Environmental Review

The Report and Order concludes that <u>all</u> small wireless facilities do not qualify as "undertakings" or "major federal actions," thereby circumventing the protections of NHPA and NEPA. As we documented in our June 15, 2017, comments, these projects not only have the potential to impact tangible resources (i.e., archaeological sites), but also intangible resources such as landscapes and Traditional Cultural Places. Removing all of these facilities from environmental review will result in the destruction of irreplaceable cultural resources across the country. This result is contrary not only to federal law, but also the trust responsibility owed tribes. FCC is complicit in the destruction of cultural resources and the abdication of its responsibility to all sovereign Indian Nations.

Rolling back protections for tribal cultural and historic properties will have grave consequences for Pechanga and our irreplaceable cultural resources. For nearly 40 years, the Pechanga Band has actively participated in the environmental review process under both state and federal law in order to protect our invaluable Luiseño cultural resources. We currently consult with over 100 federal, state, and local governments concerning impacts to cultural resources. Pechanga is a leader in utilizing state of the art technology to assist our government partners in identifying, assessing, and avoiding and minimizing impacts to our cultural resources. Our mandate is to protect the People (burials), their Places (villages), and Things (artifacts) and we rise to that occasion on a daily basis. As June 15, 2017, comments note, we employ a network of professionals, all of whom provide input in our review of projects, including small wireless facilities. Pechanga's commitment to providing excellent and professional research to applicants and agencies is for the sole purpose of protecting our cultural heritage, while working together to see projects through fruition.

III. Grossly Mischaracterizes the FCC's Consultation Efforts

The Report and Order misrepresents the extent of formal consultation carried out prior to the release of the draft by including listening sessions, briefings, and other meetings that were not true consultations. Further, the Report and Order is misleading in that it states, for example in paragraphs 28 and 29, that FCC "consulted" with various tribes; however, the Report and Order does not mention that every single tribe listed stated clearly on the record that it did not consider the sessions to be consultation. The January 24, 2018, call was recorded and the record will reflect the unanimous dissent by tribes that the call constituted "consultation." Further, Pechanga participated in the NATHPO "dialogue session" in August 2017, which the tribes in attendance likewise stated was not consultation.

Pursuant to the NHPA's implementing regulations, "Consultation means the process of seeking, **discussing**, and **considering** the views of other participants, and where feasible, seeking agreement with them…" 36 C.F.R. Part 800.16 (Emphasis Added). During the sessions in which Pechanga participated, there was no discussion with the FCC. When questions were asked by Tribes, FCC representatives did not provide answers nor did they offer solutions to the problems alleged by the industry, or by the tribes themselves. This simply does not meet the definition of consultation as there was little to no dialogue with FCC staff. Further, it is our position that the Report and Order completely dismisses Tribal concerns and views, another failure of the concept of "consultation" which includes considering the view of others. Pechanga believes that the only view the FCC has considered is that of the industry. There are 573 federally recognized and sovereign Indian Nations who will be affected by this Report and Order and absolutely no consideration by the FCC as to the disproportionate and deleterious impact this drastic rule change will have on our community and all Tribal Nations.

Finally, with respect to the lack of consultation conducted by the FCC, Pechanga notes that in our June 15, 2017, letter, we specifically requested government to government consultation with the FCC regarding our concerns. On January 8, 2018, Janet Sievert and Sayuri Rajapaske contacted my office and stated that they would be calling to schedule a consultation with Pechanga during the first or second week of February. No consultation was scheduled and no follow up was forthcoming by the FCC. On March 12, 2018, FCC staff did conduct a phone call with Pechanga after my office notified them on March 9, 2018, of their failure to consult; however, this is not to be considered consultation as it occurred long after the second draft Report and Order were issued. During that call, staff apologized several times for failing to consult with Pechanga, but also stated they believed they have conducted sufficient consultation. Pechanga disagrees and maintains that little to no meaningful consultation was conducted by the FCC on the issues presented by the Report and Order.

Once tribal cultural and historic properties are damaged, it is often irreversible. Therefore, like other tribes throughout the country, we will have no recourse if the deployment of wireless technology results in the destruction of our tribal cultural and historic properties. Accordingly, we ask that all Commissioners vote against adopting this draft Report and Order.

Should you have any questions regarding these comments, please contact me at (951) 770-6171 or sbodmer@pechanga-nsn.gov.

Sincerely,

Steve Bodmer
General Counsel

Enclosure

cc: Senator Tom Udall
Senator John Hoeven

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)))	WT Docket No. 17-79

Comments of

The Pechanga Band of Luiseño Mission Indians
Pechanga Indian Reservation
Temecula, California

Steve Bodmer, General Counsel

Introduction

These comments are submitted on behalf of the Pechanga Band of Luiseño Indians ("Tribe"), a federally-recognized and sovereign Indian Nation. The Tribe has also signed onto comments submitted by the National Congress of American Indians, United South and Eastern Tribes Sovereignty Protection Fund, and National Association of Tribal Historic Preservation Officers ("NCAI Comments"). Those comments are adopted by reference and incorporated herein to address the broader tribal concerns presented by the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("FCC") on May 10, 2017. These additional comments are being submitted to address more specific concerns of the Tribe regarding the NPRM.

First, the Tribe notes that our Tribal Historic Preservation Officer ("THPO") and our Tribal Council have been actively engaged in the issues presented in the NPRM for nearly a year. In fact, the Tribe submitted a letter to the FCC Chairman on October 25, 2016, requesting consultation on these issues, and that an intertribal work group be created to address the concerns raised by the industry regarding tribal involvement in wireless broadband projects. To date, the Tribe has not received a response to its letter, nor has the FCC attempted to coordinate a tribal effort to address these most important issues. While the NPRM states that the FCC has been "facilitating meetings among Tribal and industry stakeholders with the goal of resolving challenges to Tribal requirements in the Section 106 review process" since September 2016, there has been no directed *consultation* effort by the FCC to engage tribes with respect to these issues.

In addition to the trust responsibility owed tribes by the FCC, simply "facilitating meetings" falls short of the tribal consultation mandates by both Presidents Bush and Obama. The purpose of Executive Order 13175 is "to establish regular and meaningful consultation with tribal officials in the development of Federal policies that have tribal implications, [and] to strengthen the United States government-to-government relationships with tribes..." The Order defines "Policies that have tribal implications" as "regulations, legislative comments or proposed legislation, and other policy statements *or actions that have substantial direct effects on one or more tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes*." (Emphasis Added, Section 1 (a)). In this instance, the NPRM implicates all three concerns: 1) this action directly affects all 567 federally-recognized tribes; 2) it is affecting the relationship between the Federal government and tribes as it seeks to limit compliance with federal laws that explicitly protect tribal interests; and 3) could be seen as a unilateral decision due to the lack of consultation, thus creating an imbalance in the distribution of power between the Federal Government and tribes. President Obama's Memorandum on Tribal Consultation (November 5, 2009) reaffirms the policy in Executive Order 13175. The NPRM's request that tribes submit written comments on a unilaterally prepared document without the benefit of a meaningful dialogue between the FCC and interested Tribes simply falls short of these policy directives.

Based on these principles and mandates, the Tribe requests that in addition to accepting comments under the NPRM, the FCC also engage in meaningful consultation with tribes on the issues

presented in the notice. There are 120 separate items upon which the FCC has requested comments, and within each item there are multiple questions for which the FCC is asking for input. It is impossible to respond meaningfully to the vast amount of information requested in the NPRM on issues of vital importance to the Tribe, particularly with only 30 days allotted for review and comment. As such, we request that these comments, and those incorporated by reference, be used as the beginning point for proper consultation with the FCC on these issues.

To facilitate future consultation with the FCC regarding the issues raised in the NPRM, below are the Tribe's additional comments on the NPRM.

I. Notice of Proposed Rulemaking

B.2.a. Need for Action

17: The FCC has requested, among other things, "[C]oncrete information on the amount of time it takes for Tribal Nations to complete the Section 106 review process..." As the NCAI Comments make clear, there is no one-size fits all answer to the amount of tribal resources and time committed by tribes in responding during the Section 106 process. The Pechanga Tribe's Cultural Resources Department is comprised of numerous professionals, each of whom contribute to the review of and comment on projects within the Tribe's aboriginal territory. The Tribe employs tribal members and elders who provide cultural history and information on the stories, songs, customs, and traditions that relate to the location and significance of historic properties; two archaeologists; an ethnohistorian; a planning specialist; and legal counsel. This is the team of professionals from which the applicant obtains information not otherwise available during the Section 106 process.

The time each project takes to review and provide comment on will depend, at a minimum, on the size of the project, the location within the Tribe's territory, the known cultural resources located therein, and the impacts of the proposed project. While the NPRM seems to assume on some level that wireless broadband infrastructure is discrete in its impacts to historic properties, the Tribe knows that this is simply not the case. First, as the NCAI Comments indicate, many resources that are eligible for or are listed on the National Register of Historic Places ("Register") are not located on lands under the control of tribes. This means that the majority of historic properties are located on private lands to which the Tribe does not have access, and from which tribal people may have been excluded for generations. As such, tribes may not have sufficient information at the first contact with the applicant to provide sufficient information, which results in requests for additional data and potentially a visit to the site so tribal members can determine, based on the landscape and cultural knowledge, whether there are resources that may be impacted by the project, and the nature of those resources.

Second, the FCC cannot assume that every resource that may be encountered is "archeological" in nature. By way of example, Traditional Cultural Properties ("TCPs") are those historic properties that have both tangible and intangible cultural import to tribes. See National Park Service Bulletin

38 for information on TCPs, including how to identify and assess such resources for Register eligibility. For example, a few years ago a cell tower was installed within the Tribe's Ancestral Original Landscape (subsequently listed on the Register) after a consultation failure by the lead agency. That tower now impacts the viewshed of the Landscape, an impact that would be ignored if the FCC adopts guidance which assumes that wireless infrastructure has a narrow and limited impact on historic properties. Even if the physical footprint of such structures is minimal, their existence poses a direct and significant impact on certain types of cultural resources/historic properties. Additionally, even with a minimal footprint, physical structures have the potential to impact resources, including human burials and cremations, many of which will not have surface indicators of their presence. These factors are just some of the considerations the Tribe reviews during the Section 106 process and which considerations will depend on the size, type, and location of a given project.

Using the TCP example, during the Section 106 process, if a tribe identifies a TCP that has not yet been assessed for eligibility, the agency must undertake the identification and eligibility determination consistent with the four Register criteria. The agency can only undertake this assessment in consultation with tribes because the value of the property lies with the community that attributes cultural value to the resource. This can be a long process as it requires tribes to collect cultural, ethnographic, anthropological, and archaeological data necessary to complete the Tribe's determination assessment, which is then turned over the agency for review. Similar analysis is required for the majority of other cultural resources that may be eligible for listing as historic properties during the evaluation phase of the Section 106 process. There are simply too many variables at play to provide with certainty the amount of time such information gathering and transmission will require. We hope to assist the FCC in understanding the complex nature of Tribal participation and review under Section 106 in our future consultation on these issues.

It is impossible to provide the concrete information requested by the FCC in this section. In our years of experience working with our federal partners under NEPA and Section 106, there is no formula that can be applied to determine the time it will take for a particular Section 106 review. Notably, FCC appears to assume that the applicant is responding timely and adequately to tribal requests for information needed to review a given project. If the applicant does not provide the information requested to assist the Tribe, this will delay the review process. The Tribe makes specific requests for information (i.e., maps, grading plans, and engineering reports), such that there should be no confusion on the part of the applicant as to what information is being requested and why it is relevant to the Tribe's review. Requesting such information is not a delay tactic by the Tribe, but rather a focused effort to ensure we have all the data necessary to provide the most comprehensive information available to the applicant.

Further, in response to the FCC's request for information on the "benefits attributable to Tribal participation," including actual preservation of historic properties, we would refer the FCC to the TCP example, above. This is only one example of many that we could provide. The information that the Tribe could and would offer on a project impacting a TCP would directly prevent damage to historic and culturally significant properties. Information sharing and consultation on a TCP

would consider ways to reduce visual impacts to landscapes, as well as methods to reduce impacts to physical resources. Another example would be the location of human burials, which are held in the strictest of confidence under state and federal laws to prevent looting and destruction. Absent tribal participation, an applicant is unlikely to know about the presence of such remains and if the information is not obtained from a tribe, the project may directly impact these resources. Thus, there is a direct benefit (protection of historic properties) that flows from our Tribe's involvement in the Section 106 process. We would be happy to provide additional examples in a confidential consultation with the FCC. As the NCAI Comments note, confidentiality of sensitive tribal information is a key concern for the Tribe, and such information cannot be disclosed in an open, public forum such as in these comments on the NPRM. Requesting examples on how the Section 106 process has benefitted historic preservation in concrete ways necessitates the disclosure of confidential and sensitive information, and this is not the proper forum in which to provide such data.

21: With respect to the FCC's request for comment on concurrent review under local permitting, NEPA, and Section 106, the Tribe often advocates for a joint review approach when we know that a project is subject to both state environmental and federal review. We believe that joint review addresses all of the Tribe's concerns at the beginning of the process, rather than piece-mealing our concerns, in addition to expediting review times, and eliminating delays and additional costs. However, we caution that under applicable state laws, there may be no explicit mandate to undertake joint review. In California, for example, our state law suggests that joint review be undertaken, but there is no mandate that it occur. How would the FCC enforce a joint review process if the state or local law does not require it? While we agree that this approach would be helpful, the FCC must consider how it might actually implement a joint review process which will include jurisdictions over which it had no authority.

b. Process Reforms

(i) Tribal Fees (22-31)

The Tribe provides high quality, professional information to applicants and agencies during the Section 106 review process, whether for a cell tower or a massive infrastructure project. As noted above, the Tribe employs a team of professionals – a team which provides information unavailable to applicants from any other party – that respond to requests for review. The FCC would like to know at what point the Tribe may act as a consultant or contractor. The answer is from the moment the Tribe begins to review the application and project documents. We provide information from archaeologists, ethnohistorians, elders, planners, and legal professionals during our consultation in response to each and every notice received from the Tower Construction Notification System ("TCNS"). The level of documentation and information provided by the Tribe far exceeds that which an applicant could obtain from any other consultant it might hire.

The NPRM seems to suggest that applicants can circumvent payment to tribes for professional-level services and information simply if they do not ask for such information. However,

information gathering is *required* under the 106 process for the agency to meet its mandate to identify and determine the presence of historic properties. The applicant cannot, and should not, be allowed to game the system by simply not contacting tribes for information. This suggestion in the NPRM is extremely troubling. Is the FCC looking to circumvent tribal participation and compensation by adopting a rule that allows the industry to ignore tribes and somehow still comply with Section 106? How does this meet the FCC's trust responsibility to tribes? We respectfully remind the FCC that these issues must be addressed in a manner that protects tribes, tribal interests, and the federal government's trust responsibilities to Tribal Nations, and which is consistent with federal law.

Further, when the Tribe conducts site visits and construction monitoring, we continue to provide services akin to a consultant or contractor. First, when our monitors visit a site or monitor construction, they are constantly reviewing the landscape to determine the presence and nature of, or potential impact to, resources based on the features contained on the landscape. Tribal people know how their ancestors used the land, which determines whether and what kind of resources may be present. For example, the Tribe knows that our ancestors lived near water ways and where food resources were plentiful. Only individuals with such cultural knowledge will be able to make assessments of this nature, meaning that tribes provide a level of service that only an expert (i.e., a consultant) can offer. Further, monitors watch construction activity to identify resources that may be disturbed, but which may not be recognizable to someone without their expertise. These are exactly the same kinds of services that a contractor would provide, including the specialized knowledge required to identify cultural resources.

Regarding a proposed fee schedule, the FCC must understand that there are regional differences in the costs for providing professional services. The Tribe employs multiple professionals that contribute to every project, and their associated salaries are based on the cost of living in Southern California. These costs will vary dramatically from those in other parts of the country. As such, a fee schedule that would be imposed on all tribes, regardless of their regional circumstances, is simply untenable. Further, as noted in the NCAI Comments, the FCC should not seek to punish all tribes for the actions of a few, but rather, should work directly with the tribes that are charging allegedly "exorbitant fees" to address that issue. We have consistently requested that the FCC address this concern with those tribes directly. We make this same request again.

We are concerned that the FCC does not understand the quality and nature of the services that our Tribe provides during the review process, and subsequent monitoring of construction activities. As such, it is imperative that the Tribe be able to participate in a meaningful dialogue with the FCC, not just submit written comments in reaction to a notice that is at best sided with industry concerns.

32: Regarding geographic areas of interests, there seems to be an assumption that tribes are nefarious actors, expanding their areas of interest to charge additional fees. Again, as the NCAI Comments discuss, this is not an issue presented by all tribes, but rather, one or two. Why is the FCC not addressing this directly with those limited tribes? This could be easily addressed by the

FCC if, as we have requested already on this issue and with respect to the fee concerns, the agency simply sat down with the tribes giving rise to these problems. Certainly this would be a more expeditious undertaking, and one that is commensurate with the actual problem.

Applicants need to accept the fact that Tribal peoples were here long before there were federal, state, county, and local territorial boundaries; and the FCC, as a trustee to Tribal Nations must support this fact. It is a very distinct possibility that multiple tribes may share a territory in which an applicant has a project. Each tribe has their own historic preservation concerns and their own tribal information, as addressed in the NCAI Comments. The interests of sovereign nations in their cultural histories and resources should not be ignored because of corporate interests.

One suggestion for the FCC to consider in addressing this concern is requiring tribes to submit data to support their aboriginal territory. In California, state law requires tribes to provide territory information to an agency dedicated to preserving tribal cultural resources (the Native American Heritage Commission). This information is used to notify lead agencies of tribes who may have an interest in a project that lies within their jurisdiction. A similar approach by the FCC may alleviate some of the concerns regarding multiple tribes that may have an interest in a project, and would also provide the applicant some certainty as to the number of tribes likely to respond to a given notice. There are many variations on this idea that could be implemented to address these issues, but certainly cutting out some tribes from the process arbitrarily is not the answer. We would be happy to discuss this option in more depth during our forthcoming consultation with the FCC on these issues.

We also want to inform the FCC that the Tribe does not usually work with the agency on a given project. Rather, our contact is typically with the applicant and their representatives. Our staff consults with these individuals, solves problems, creates thoughtful mitigation, and provides specific, supported comments for their projects. We understand that with our request to consult comes the obligation to respond timely to applicant requests, and we meet that obligation invariably. To our knowledge, there is no conflict with how we work with the TCNS and the industry. The NPRM assumes that there are wide-spread problems across the nation, an assumption we do not believe is supported based on our interactions with industry in other forums (i.e, the annual National Tribal Historic Preservation Officers Summit), or our experience working with applicants in the TCNS.

This is another issue that requires thoughtful and meaningful consultation with the FCC. We suggest that the FCC consider the value of obtaining all the available information from tribes that will result in good planning with respect to wireless infrastructure when looking undertake changes to the existing process.

(iii) NEPA Process

With respect to "streamlining" the NEPA review process, the Tribe does not agree that any new categorical exceptions be predicated solely on location. There are so many other factors that raise

concerns for impacts to historic properties, location being only one. Projects that will simply replace existing structures, and which have no new ground-disturbance, might be suitable for a less rigorous review. However, we still caution that even projects without additional ground-disturbance may have the potential to impact other kinds of historic properties such as TCPs. While an older tower may have been installed, usually absent tribal consultation, that does not mean that a new tower will not have new impacts (depending on height, for example) to historic properties. Footprint and ground-disturbance alone are not the only impacts that should be considered.

As with many of the issues presented in the NPRM, this one warrants further discussion because as a tribe that has been actively involved in projects in our aboriginal territory for decades under NEPA and Section 106, we have real-world experience with the kinds of projects likely to have impacts on our cultural resources. The Tribe has information that can assist the FCC with addressing some of these issues in a way that protects tribal interests and the agency's trust responsibility. We desire to be part of the conversation on proposed changes that may have unanticipated consequences.

Conclusion

The Tribe is aware that industry has been pushing these concerns for some time now, and we have been prepared to sit at the table with the FCC to work through them in a manner that respects all tribes' sovereignty, as well as the interests of the agency and applicants. Unfortunately, rather than responding to tribal requests for consultation on these issues, the FCC has issued the NPRM, which appears to be predicated solely on industry interests, particularly given that there has been no conversation with Tribal Nations prior to this notice. The FCC has an obligation to uphold the interests of Tribal Nations, not the interests of corporations like those which comprise the industry. Today we ask the agency to recognize and work with your sovereign partners to find a solution that benefits all parties.

On behalf of the Pechanga Band of Luiseño Mission Indians, we thank you for consideration of these comments and look forward to our forthcoming consultation with our federal partner.